No. 11877

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VAN CAMP SEA FOOD COMPANY, INC., a corporation,
Appellant,

vs.

ANTHONY DILEVA, IVAN JURJEV, MARIE DILEVA, MIKE DILEVA, SALVATORE DILEVA, JACK OLSEN, MARINO TRANSATTI, ANGELO CASTAGNOLA, CHIGI ROMOLIO, SALVATORE CARNAVALE, MATTEO BOLOGNA, PASQUALE GUGLIELMO and PIETRO COLOMBO,
Appellees.

REPLY BRIEF FOR APPELLANT.

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TABLE OF AUTHORITIES CITED.

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REPLY BRIEF FOR APPELLANT.

Introduction.

Appellant proposes in this Reply Brief merely to clarify several errors which appear in Appellees' Brief. No effort will be made to reargue or restate appellant's position which is fully set forth in the Opening Brief.

I.

Any Presumption of Correctness of the District Court's Decree Is Slight.

The District Judges who heard this case came to opposite conclusions as to the effect of the charter party agreement. Judge Harrison was *convinced* that the charter party agreement "by the conduct and acquiescence of the

parties continued in effect at the time of the collision." "If I am correct in this respect," he continued [A. 15], "the fishermen were not employees of the respondent. It has been intimated that the GLORIA R. was being operated under a similar agreement. If such is true the charterers of the GLORIA R. would be the proper respondents." If the "charterers" of the GLORIA R. are "the proper respondents" surely appellant is a "wrong party." This is the only conclusion that can be drawn from the statement of Judge Harrison to appellees' counsel [A. 316]. If the second Di Leva (*i. e.*, the GLORIA R. DI LEVA) is not in it you will get a judgment against you . . ."

The process by which Judge Hall regarded the Memorandum Opinion as a "vacation of the trial" [A. 67] does not appear in view of the fact that certain questions only were undecided by Judge Harrison and were to be left open "for further argument."

Appellant believes that the proper procedure should have been that pursued by the District Judge in the case of

> *L. R. Connett & Co. v. The Republic No. 5* (S. D. N. Y. 1941), 43 Fed. Supp. 245, 1942 A. M. C. 176,

in which the libelant was not permitted to add another party midway in the trial, but was left to his remedy against the proper party in a new action.

As to the questions of fact arising out of the circumstances of the collision itself, there is of course a strong presumption of correctness despite the fact that all of appellant's witnesses in the key positions testified and only a careful selection of appellees' men were produced.

As to the questions of law arising out of the statutory violations of the BESSEMER no similar presumption exists.

II.

The "Charter Party" Was Properly Before the Court on Both Trials of This Case.

In the first trial it was stipulated that the contract was to be introduced into evidence [A. 295].

In the second case it was marked for identification and in answer to the Court's questions [A. 95] Appellee DiLeva stated that they operated the boat under the charter until October 1, 1942, that thereafter they took the boat out and did the same things they had previously done under the charter, received the same share and it was the "same thing; yes, all the time. All the way through" and that the same arrangement prevailed "continually up to the date of the accident." Judge Hall followed the course which Justice Frankfurter since referred to, in the case of

> *Johnson v. U. S.* (1948), ...U. S....., 68 S. Ct. 391, 92 L. Ed. 416, 1948 A. M. C. 218, 224,

when he said "Federal judges are not referees at prize fights but functionaries of justice." The Judge questioned appellees' master to ascertain that they were operating at the time of the collision under the terms of the charter, "all the way through." Appellees are here attempting to play "a game of blind man's bluff" and would have this Court blindfold itself to the agreement. The specific testimony of their witness, who examined the document, was that *these* were the terms under which they operated continually up to the date of the accident, "all the way

through." The wording of the document is in evidence, by reference with like effect as if it had been read *verbatim* into the record by the witness. In no other way could the Court know what were the terms of their contract of employment.

It is and has been the consistent position of appellant that these men are employees. This position was pleaded in the Answer to the Fifth Amended Complaint in which [A. 30, 31] it is admitted that appellee was operating the vessel pursuant to an agreement with appellant and "that said agreement created the relationship of employer and employee" between the parties. In Article III of the Answer [A. 30] it was denied that Appellee Salvatore DiLeva had any right to sue for himself or on behalf of any crew members or master of the vessel.

The "charter party" was actually the employment agreement cast in the terms of a bareboat charter. It was effective as a contract, one of the explicit terms of which was to preclude liability for this very type of damage.

The provision, which appellees are so anxious to avoid, is merely a restatement of the relationship between these employees and their employer, as to loss of use. Inherent in the employment contract of fishermen on shares, is the prohibition of any right to sue for detention damage. The cases establishing this rule (which have been cited with approval by this Court) are discussed on pages 21-29 of Appellant's Opening Brief.

III.

The Case of the Petrel Is Not in Point.

In the case of

The Petrel (1893), L. R. P. 326, L. J. P. 92,

cited by appellees and discussed in Appellant's Brief (App. Br. p. 26), it is to be noted that the crew members had clear title to the subject of the cause of action. They owned the personal effects involved. To say that this case is in point is to beg the question of whether or not appellees have any rights whatsoever in the cause of action for detention damages other than to share any *actual* recovery. Appellant strongly urges that such cause of action could only have arisen in the owner of the BESSEMER, and the crew's rights depend entirely upon whether or not the owner had a cause of action. If the owner had no right to sue, as here, the crew members have no right to compel him to sue.

The Court in the case of *The Petrel* (*supra*) also pointed out that, where ships of the same company met at the same dock (as in the instant case) and depended upon the skill with which other ships of the same company were operated, it might well be a case in which the crew were fellow servants. In this case the vessels of appellant embarked and discharged at the same dock, were all engaged upon the same mission (fishing for sardines) in the same general area (waters immediately adjacent to San Pedro). They were bound to come into the vicinity of other vessels of appellant which were also pursuing schools of fish. If more than one vessel sighted the same school before it was captured, or before the first vessel commenced to "set," the "safety of each thus became in

the ordinary course of things dependent upon the skill with which the other was navigated."

The Jones Act (46 U. S. C. A. Sec. 688) altered the common law fellow servant rule in personal injury cases only. It is of course not applicable to this case.

IV.

No "Trust" Arises in Favor of the Crew Members When There Is No Cause of Action for Detention Damage Because the Owner Cannot Sue Himself.

The "trustee" theory, relied upon by appellees, becomes entirely untenable when we consider that the quotations and cases cited by appellees refer only to the situation in which there is a trust *res*, either money *actually* recovered by the owner by sale of the fish or damages recovered for its value, or an *existing* cause of action for that value. Here appellees would have this Court create an entirely new cause of action where none existed before, in favor of the fishermen. This Court in the case of

> *The Lydia* (C. C. A. 9th 1928), 24 F. (2d) 683, 1928 A. M. C. 700,

adopted the statement "They have no title to the property and could maintain no action for it."

Appellees admit that the crew has no title to the fish caught by the vessel. If the "net proceeds" of the fishing expedition is a law suit the fishermen likewise have no "title" to it. They have merely the contingent right to be paid their share of what the owner can recover for them. If he can recover nothing because there is no liability on the part of the party sued, or if there is no cause of action, there is nothing to share.

V.

The Statutory Violations of the Bessemer Were Not Proved to Be Neither a Cause nor a Possible Cause of the Collision.

A. The Lookout Was Primarily an Observer of Fish, Not a "Free and Single-Minded Lookout."

If the "Lookout" or "mastman" on the BESSEMER had any duty to observe other vessels, that duty was entirely incidental to his job of directing the pursuit of the school of fish. Appellee Anthony DiLeva indicates [A. 98] that the mastman's job is "to look for fish" and that he was looking at the fish and "seen the GLORIA R. all the time" [A. 99]. Surely it cannot be asserted that this man, who was the only claimed lookout, could possibly be giving his undivided attention to the GLORIA R. Had he been paying sole attention to the other vessel in all probability he would not have completed the turn [A. 83].

B. Extra Care Should Have Been Exercised by the BESSEMER in View of the Unusual Circling Maneuver, and Special Circumstances Presented.

Appellee Anthony Di Leva states [A. 79] that two counterclockwise circles were made. (This was the usual direction [A. 97] of the circle.) Then "all of a sudden the fish were traveling" and they made a third circle clockwise. This was more convenient to follow the unpredictable movement of the school. Inasmuch as this third circling by the BESSEMER was an unusual starboard turn, it should have required extra care to avoid collision. They completed the circle [A. 83] even if it meant turning into the side of the GLORIA R!

C. The Absence of a White Masthead Light on the BESSEMER Was a Contributing Cause of the Collision.

The statutory rule, requiring a white masthead light on a different plane from the red and green running lights, has a definite purpose. Its presence is to allow other vessels more quickly and certainly to identify a vessel's course or to recognize a change in course. The masthead light may be inconvenient to the fisherman, "because it throws light and you can't see the fish" [A. 111], but nothing will excuse its absence. In the case of

Lind v. U. S. (C. C. A. (2d) 1946), 156 F. (2d) 231,

and the

Sun D'E (C. C. A. 9th, 1936), 81 F. (2d) 680 (cited by appellees), the Court found that the white masthead light was lighted.

The BESSEMER's testimony indicates that that vessel was completing a starboard circle. The GLORIA R's testimony likewise describes a turning maneuver. The BESSEMER, at the time of the collision, struck the GLORIA R at about or a little forward of amidships on a 78-foot vessel [A. 248]. The GLORIA R according to both masters was going at a speed of eight knots [A. 254; 215], 800 feet per minute (a knot is a nautical mile, or 6000 feet, per hour), or 13⅓ feet per second. Had the GLORIA R had but three seconds more she *might* have cleared! In three seconds she moved 40 feet through the water, in four seconds 53 feet, in five seconds 67 feet, in six seconds 80 feet. If the BESSEMER's white masthead light had been lighted, the rate and direction of the turn would have been indicated to the GLORIA R substantially sooner than it actually was. Prompt indication of the course or a turn is the very purpose of the required light!

Appellees must establish that it was *impossible* for the GLORIA R to have avoided the collision if the white light had given the GLORIA R this *additional warning.* The rule of

The Pennsylvania (1874), 86 U. S. 125, 136, 22 L. Ed. 148,

requires appellees to prove not only that these statutory violations *did not* contribute to the accident, but also that each of them *could not have been one of the causes.* This is the settled holding even in

The Scagmore (C. C. A. 1 at 1917), 247 Fed. 743 (cited by appellants).

VI.

The Salvage Cases Cited by Appellees Are Not in Point for the Proposition That Fishermen Can Sue Their Employer for Detention Damage.

It is well settled that mariners have an independent right to sue in their own names for salvage service.

Benedict on Admiralty (6th Ed.), Vol. I, p. 343.

Their rights do not exist through the owner or only in so far as the owner has rights to salvage. The owner cannot release their claims.

The Neptune (C. C. A. 2d, 1921), 277 Fed. 230.

They thus have "title" to the cause of action for salvage. It is immaterial that they can sue their owner-employer when their salvage efforts exceed the normal requirements of their duty to their ship.

In the case at bar, the fishermen have the right to share in the proceeds of the voyage only in so far as the owner makes an actual recovery. They have no independent rights.

VII.

Damages Are Incorrectly Assessed.

Appellees have made no effort to answer Appellant's proposition that there are nine calendar days from October 4th to October 12th and that the District Judge used ten calendar days for this period. The Court also approximated 45 days for the period October 14th to November 30th. Actually there are 48 calendar days during this period. Using the District Court's own formula, with the proper divisors, the maximum award (even granting the liability question for the sake of argument) would be $2,346.24 as computed in Appellant's Brief [Appendix 7].

Appellees in discussing damages (Appellees' Br. p. 19), carefully avoid the statement that 10 calendar days were lost or that there remained 45 days to the end of November except in so far as they indorse the District Court's error. On page 5 of their brief, however, appellees make the casual but flat statement that ten calendar days were lost. The same error appears on page 10.

VIII.

Conclusion.

Appellants therefore submit that the District Court's decree should be reversed and the libel be dismissed.

Respectfully submitted,

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